

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

CLAUDINE OSGOOD, an individual,  
 and ANTON EWING, an individual,

Plaintiff,

v.

MAIN STREAT MARKETING, LLC,  
 a Utah limited liability company;  
 JERROD ROBKER, an individual aka  
 Jerrod McAllister; Does 1-100, ABC  
 Corporations 1-100, XYZ, LLC's 1-  
 100,

Defendants.

CASE NO. 16cv2415-GPC(BGS)

**ORDER DENYING PLAINTIFFS'  
 MOTION TO REMAND TO STATE  
 COURT**

[Dkt. No. 12.]

Before the Court is Plaintiff Anton Ewing's motion to remand to state court. (Dkt. No. 12.) An opposition and a reply was filed. (Dkt. Nos. 14, 18.) On November 7, 2016, Plaintiff Claudine Osgood filed a reply.<sup>1</sup> (Dkt. No. 25.) Based on the reasoning below, the Court DENIES Plaintiffs' motion to remand.

**Background**

On August 15, 2016, Plaintiffs Claudine Osgood and Anton Ewing, proceeding *pro se*, filed a state court complaint in the San Diego Superior Court for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq* ("TCPA"); violation

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<sup>1</sup>Because Plaintiffs are proceeding *pro se*, the Court liberally construes Plaintiffs' pleadings and considers the arguments raised in Osgood's reply even though she did not file a motion to remand. See Estelle v. Gamble, 429 U.S. 97, 106 (1976).

1 of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) *et seq.*  
 2 (“RICO”); and violation of California Penal Code sections 632 and 637.2(a)-(b) against  
 3 Defendants Jerrod McAllister and Main Street Marketing, LLC. (Dkt. No. 1-2,  
 4 Compl.) On or about August 16, 2016, Plaintiffs served the Complaint and Summons  
 5 on Defendant Main Street and Defendant McAllister via mail with return receipt  
 6 requested sent to 333 Nth Main Street, Cedar City, UT 84721. (Dkt. No. 1-2, Notice  
 7 of Removal, Ex. A at 39, 41<sup>2</sup>.)

8 On September 26, 2016, Defendants filed a notice of removal. (Dkt. No. 1.) On  
 9 October 4, 2016, Plaintiffs filed a first amended complaint. (Dkt. No. 11.)

## 10 Discussion

### 11 A. Motion to Remand

12 Plaintiffs move to remand the case to state court arguing that the notice of  
 13 removal was not timely filed as it was filed more than 30 days after Defendants were  
 14 served on August 16, 2016 contrary to 28 U.S.C. § 1446(b). Defendants argue they  
 15 timely complied with 30 day time requirement under 28 U.S.C. § 1446(b) because in  
 16 California service of process is deemed complete 10 days after mailing pursuant to  
 17 California Code of Civil Procedure section 415.40 (“section 415.40”).

18 A motion to remand is the procedure to challenge removal of an action to federal  
 19 court. 28 U.S.C. § 1447(c). There is a presumption against removal and the defendant  
 20 always has the burden to demonstrate that removal was proper. Moore-Thomas v.  
 21 Alaska Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009).

22 Under 28 U.S.C. § 1446, a notice of removal of a civil action must be filed  
 23 within 30 days after “the receipt by the defendant, through service or otherwise . . . .”  
 24 28 U.S.C. § 1446(b). California Code of Civil Procedure section 415.40 provides,

25 A summons may be served on a person outside this state in any manner  
 26 provided by this article or by sending a copy of the summons and of  
 27 the complaint to the person to be served by first-class mail, postage  
 prepaid, requiring a return receipt. Service of a summons by this form  
 of mail is deemed complete on the 10th day after such mailing.

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<sup>2</sup>Page numbers are based on the CM/ECF pagination.

1 Cal. Code Civ. Proc. § 415.40. According to this provision, service is deemed  
2 complete on the 10th day after such mailing. Id.

3 A defendant's time to remove is triggered by formal service of the summons or  
4 complaint and "not by mere receipt of the complaint unattended by any formal service."  
5 Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48 (1999). The  
6 thirty-day period is "triggered" by "simultaneous service of the summons and  
7 complaint" or by "receipt of the complaint 'through service or otherwise' after and  
8 apart from service of the summons, but not by mere receipt of the complaint unattended  
9 by any formal service." Id. While not addressing whether service may be effectuated  
10 pursuant to state law, courts have noted the Supreme Court's reliance on state law  
11 service of process to trigger a defendants' removal obligations in Murphy. City of  
12 Clarksdale v Bellsouth Telecomms., Inc., 428 F.3d 206, 210 n.6 (5th Cir. 2005) (noting  
13 that Supreme Court examined the various state procedure for initiating a lawsuit and  
14 the effect of these differences on the removal statutes); Perez v. Bank of America,  
15 N.A., No. EP-13cv285-KC, 2013 WL 5970405, at \*3 (W.D. Texas, Nov. 7, 2013)  
16 (citing Murphy as it described official service with reference to "local law"); In re  
17 Pharm. Indus. Average Wholesale Price Litig., 307 F. Supp. 2d 190, 195 (D. Mass.  
18 2004) ("After Murphy Brothers, proper service of process under state law is required  
19 to trigger a defendant's removal obligations."). "Although federal law requires the  
20 defendant to file a removal motion within thirty days of service, the term 'service of  
21 process' is defined by state law." City of Clarksdale, 428 F.3d at 210; Usatorres v.  
22 Marina Mercante Nicaraguenses, 768 F.2d 1285, 1286 n. 1 (11th Cir.1985) ("A federal  
23 court may consider the sufficiency of process after removal and does so by looking to  
24 the state law governing process.").

25 Even prior to Murphy, the Ninth Circuit has held that "the sufficiency of service  
26 of process prior to removal is strictly a state law issue." Lee v. City of Beaumont, 12  
27 F.3d 933, 936-37 (9th Cir. 1993), overruled on other grounds, California Dept. of  
28 Water Resources v. Powerex Corp., 533 F.3d 1087, 1096 (9th Cir. 2008)). In line with

1 this statement, district courts have held that “[s]tate law determines when the defendant  
 2 first receives formal service of process.” Taylor Morrison of Cal., LLC v. First  
 3 Specialty Ins. Corp., Case No. SACV 15-1711 JVS(JCGx), 2015 WL 8215345, at \*3  
 4 (C.D. Cal. Dec. 8, 2015) (applying 10 days period in section 415.40 in calculating start  
 5 date of 30 day period for removal); Trust v. Staab, No. EDCV 15-1357 JVS(SPx), 2015  
 6 WL 8493925, at \*2 (C.D. Cal. Dec. 9, 2015) (applying Cal. Civ. Proc. Code § 415.56  
 7 to conclude that service becomes effective 10 days after posting and mailing under);  
 8 Watts v. Enhanced Recovery Corp., No. 10cv2606-LHK, 2010 WL 3448508, at \*3  
 9 (Sept. 1, 2010) (“The sufficiency of service of process prior to removal from state court  
 10 is determined under state law.”); see Big B Automotive Warehouse Distribs., Inc. v.  
 11 Cooperative Computing, Inc., No SC 00-2602, 2000WL 1677948, at \*4 (N.D. Cal.  
 12 Nov. 1, 2000) (applying ten day grace period under section 415.40 to determine  
 13 whether notice of removal was timely). Moreover, in Jimena v. Standish, 504 Fed.  
 14 App’x 632 (9th Cir. 2013), the Ninth Circuit held that the district court properly denied  
 15 Jimena’s motion to remand because defendants’ notice of removal was timely and cited  
 16 to 28 U.S.C. § 1446(b) and Cal. Civ. Proc. Code § 415.40. Id. at 634.

17 Plaintiffs argue they served the summons and complaint pursuant to section  
 18 415.40 by mailing them registered mail with return receipt. According to Plaintiffs, the  
 19 30 day period begins to run on the date of mailing, which was August 16, 2016.  
 20 Plaintiffs also allege that Defendants received the summons and complaint on August  
 21 22, 2016, and Plaintiff Ewing emailed<sup>3</sup> the summons and complaint to Defendant  
 22 McAllister on August 16, 2016. Therefore, Ewing argues that Defendants had notice  
 23 of the lawsuit as early as August 16, 2016 and as late as August 22, 2016 and the notice  
 24 of removal is untimely based on either of these dates. In reply, Plaintiffs argue that the  
 25 10 day service rule in section 415.40 does not apply to 28 U.S.C. § 1446’s 30 day  
 26 requirement. However, Plaintiffs’ argument is not supported by case law. As

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28 <sup>3</sup>Plaintiffs have not provided authority that email is a proper method of service  
 in California.

1 discussed above, state law determines when service of process is effectuated prior to  
2 removal.


3 On August 16, 2016, Plaintiffs mailed copies of the summons and complaint to  
4 each Defendant by “first-class mail, postage prepaid, requiring a return receipt.” (Dkt.  
5 No. 1-2, Notice of Removal at 39, 41.) Pursuant to section 415.40, service was  
6 completed ten days later on August 26, 2016. Therefore, Defendant had thirty days  
7 from August 26, 2016 to file the notice of removal. Thirty days from August 26, 2016  
8 was September 25, 2016, which was a Sunday. Under Fed. R. Civ. P. 6(a)(1)(C), in  
9 computing any time period if the “last day is a . . . Sunday . . the period continues to  
10 run until the end of the next day that is not a . . . Sunday . . . .” Therefore, since  
11 September 25, 2016 was a Sunday, the thirty day period to file a notice of removal was  
12 Monday, September 26, 2016. Defendant filed its notice of removal on September 26,  
13 2016. (Dkt. No. 1.) The notice of removal was timely under 28 U.S.C. § 1446(b), and  
14 thus, the Court DENIES Plaintiffs’ motion to remand to state court.

### 15 Conclusion

16 Based on the above, the Court DENIES Plaintiffs’ motion to remand to state  
17 court. The hearing set for November 18, 2016 shall be vacated.

18 IT IS SO ORDERED.

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20 DATED: November 15, 2016

21   
22 HON. GONZALO P. CURIEL  
23 United States District Judge  
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